

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3779 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA.

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO

BB DWIVEDI - GAS

Versus

STATE OF GUJARAT

Appearance:

TANNA ASSOCIATES for Petitioner

MR KG SHETH WITH MR SP HASURKAR for Respondent No. 1

NOTICE SERVED BY DS for Respondent No. 2, 3, 4

CORAM : MR.JUSTICE R.BALIA.

Date of decision: 17/09/1999

ORAL JUDGEMENT

1. The petitioner at the time of filing this petition was aggrieved of the promotion / appointment given to one Mr. J.H.Babaria on ex-cadre post by order dated 19/11/1998 without considering the case of the petitioner and the persons junior to the petitioner in the cadre of service members of which were considered for such selection on being appointed. The petitioner was

also apprehensive of the fact that many more persons junior to him may be appointed in future by passing his claim to the post for being considered on the basis of seniority and other relevant rules.

2. During the pendency of this petition, by way of interim order dated 21/5/99, the Court directed that if the Departmental Promotion Committee has taken any decision to promote the officer[s] other than the present petitioner, especially those who are junior to the petitioner, then, such promotion should not be effected or implemented so far as junior[s] of the petitioner is/are concerned. This order was ultimately vacated on 30th June 1999. The Government in General Administration Department has issued appointment orders of 22 Gujarat Administrative Service Officers, out of 20 officers are junior to the petitioner. The respondents have in their reply admitted that the persons junior to the petitioner have been promoted to the ex-cadre posts which carried higher duties, responsibilities and higher pay scale.

3. It has further been stated in the reply that, in the first instance, departmental promotion committee met on 30th March 1998 which found that the petitioner Shri Dwivedi was not fit to be included in the select panel of officers for the purpose of appointment to the ex-cadre post. The representation of the petitioner dated 24/11/1998 also did not find favour of the DPC which held its meeting on 10/12/1998. In pursuance of the recommendation of DPC held on 30/3/98, Mr. Babaria was given appointment on 19/11/98 who is admittedly junior to the petitioner. Thereafter, once again, the DPC met for considering the appointment on the ex-cadre post on 26/4/99, which again found the petitioner unfit for inclusion in the select panel and as noticed above, appointment orders were issued on 1st July 1999 amongst whom another 20 persons junior to the petitioner have been appointed.

4. As recorded in order dated 9/9/1999, the proceedings of the DPC were placed before the court for perusal.

A perusal of the DPC proceedings dated 30th March 1998 goes to show that the departmental promotion committee by prefacing its minute of proceedings that recommending the officers for ex-cadre post appointment though strictly does not fall within the exercise of promotion in the direct line in their cadre, decided to apply the same procedure and standards for the purpose of selecting the candidates for recommendations. It also

made clear that, in order to obviate hardship to those of G.A.S. Officers against whom either a decision is taken to institute a departmental inquiry or against whom departmental enquiry is pending at the time of Selection Committee, a "sealed cover" procedure is followed as per Government Order. the Committee's Minutes speak about consideration of the petitioner. "The committee having regard to the general profile of the officer has come to a considered opinion that Shri B.B.Dwivedi is "NOT FIT" to be included in the Select Panel of the G.A.S. Officers for the purpose of appointment to Ex-cadre post."

No material was referred to which the DPC has considered. However, the proceedings further go to show that except in the case of the petitioner, wherein other officers have not been found fit for recommendation, the DPC has referred to the material which is taken into consideration by it for the purpose of forming its opinion. Therefore, it is not possible from the proceedings of DPC to know on what existing material the DPC constituted its opinion in the case of the petitioner.

In pursuance of the recommendations of the said DPC, the appointment of Mr. J.H.Babaria, a person junior to the petitioner has taken place.

The record further goes to show that the petitioner made a representation against the recommendation of the DPC in pursuance of the meeting held on 30th March 1998 which is alleged to have been considered in meeting held on 10/12/98. Record of proceedings goes to show that, on 26/11/98, it was noticed after reproducing the adverse entry referred to above though it is possible to hold the petitioner not fit for recommendation for the appointment on the ex-cadre post on the basis of the said material, but since it was communicated to the petitioner as not adverse and no objections were invited, it would be unfair to take that material to be adverse to the petitioner. Apart from that entry, if any other material which appears to have gone into consideration, it must be discernible from the proceedings. This being not so reconsideration was considered necessary. On 3/12/98, it was noted that the Committee had taken overall view especially of the anti corruption case. But no other adverse remarks are available to be recorded. With this notings, the matter was taken on agenda for reconsideration by the DPC on 10/12/1998, which re-affirmed the earlier decision. There was nothing in

the confidential report against the petitioner, yet on the totality of the reports, they do not think it necessary to be fit particularly keeping in view the ACB trap case.

Again when the question came for considering the petitioner for ex-cadre post in question, the meeting of DPC was convened on 26th April 1999. The minutes of the DPC held on 26/4/99 vis-a-vis the petitioner finds consideration in the following manner.

"[8] Shri B.B.Dwivedi :- The Committee was informed that Shri Dwivedi was caught red handed while accepting illegal gratification when he was functioning as Deputy District Development Officer. However, the then Government did not grant permission for prosecution. This decision of the Ex - Government is under review before the present Government. Moreover, there are Adverse Remarks in the ACR for the year 1996-97 of Shri Dwivedi. The Committee, therefore, decided to declare Shri Dwivedi UNFIT for inclusion in the select panel."

5. The two factors which have been considered by the DPC while considering the case of the petitioner are firstly, that 'the petitioner was caught red handed in connection with an anti corruption case', prosecution of which was not sanctioned by the Government earlier. The DPC was informed that the case is now being reconsidered by the present Government and secondly, that for the assessment period 1996-97, the petitioner has an adverse entry in his service record.

6. It is well settled that the assessment of the DPC on the basis of material before it is the subjective opinion of the committee and is not liable to be challenged by way of judicial review. It is equally well settled that where a decision is founded on subjective satisfaction of an authority, still it has to be founded on same existing objective material having relevance to formation of opinion. The formation of subjective material cannot be founded on nonexisting material or the material which cannot be taken into consideration. The adequacy or sufficiency of the material for formation of opinion which is subjective in nature may not be relevant for the purpose of judicial review, but the existence of the material has to be shown if the validity of consideration depending on subjective satisfaction is

challenged on that ground.

The question thus arise whether the material relied on by the DPC while considering the case of the petitioner for suitability to the ex-cadre appointment in question did exist when consideration took place or could have been considered.

The first material relied on is information that the petitioner was 'caught red handed in anti corruption case' and the Government is considering to review its earlier decision not to sanction the prosecution of the petitioner.

7. In this connection, the facts which are not in dispute need be considered. A complaint was lodged against the petitioner and two other persons by one Ashwinkumar Ochchhavlal Sheth alleging that the petitioner has demanded a sum of Rs.51,000/- somewhere in March 1996. In the first instance, part payment was made of Rs.7,000/- and Rs.8,000/- and thereafter, on 18th March 1996, the petitioner again demanded balance of the amount, against which the complainant promised to pay Rs.30,000/on 21/3/1996, which offered on 22/3/1996 to the clerk of the petitioner - Mr. Kamlesh Narendrabhai Patel, who in turn directed the amount to be paid to one Harshad @ Tino Ratilal Thakkar, who is not a Government employee, sitting on the counter of Ambica Hotel. The complaint itself is suggestive of the fact that it was not a case of red handed apprehension of the petitioner demanding or receiving the illegal gratification. In pursuance of that complaint. In the first instance, the petitioner was suspended by order dated 12/8/1996 and by order dated 1/1/97, the petitioner was reinstated and no chargesheet was filed against the petitioner. While according to the petitioner, no case was made out, according to the respondents, merely because the State Government has refused to issue sanction for prosecution of the petitioner on political interference, the prosecution could not be launched against the petitioner as per the requirement of the Code of Criminal Procedure. According to the respondents, on 4/4/1998, the committee was constituted to reconsider the cases closed by the previous Government and take decision thereon. If the committee itself was constituted on 4/4/1998, there could not have been any question of reconsideration by the Government for sanctioning prosecution at least on 30/3/1998. In pursuance of the committee decision, the petitioner has been suspended once again, only on 7th June 1999 pending consideration whether to sanction the prosecution. Thus, decision for not prosecuting is yet

to be reviewed. These facts emanate from the reply of the respondents. Therefore, neither on 30/3/1998 nor on 26/4/1999, there was any decision of the Government against the petitioner for initiating action in respect of the said complaint has come in existence. The primary fact relied on as per minutes of proceedings goes to show that it was the incident of being 'caught red handed' while accepting the illegal gratification was the material that has gone in consideration which itself is admittedly not existing fact. Learned counsel for the respondents was given opportunity to show whether there is any material before the departmental promotion committee or with the State Government which could be fed to the DPC about the petitioner being caught red handed in an anti corruption case. The fact that case is being pending consideration for launching prosecution because of an allegations made against the incumbent is entirely different from the gravity of the cases of a person who is caught red handed accepting or demanding illegal gratification.

8. The Under Secretary to the Government of Gujarat has informed the learned Government Solicitor on this aspect for the purpose of informing the Court vide letter dated 16th September 1999 that the words "caught red-handed" have been used inadvertently while giving dictation for the minutes of the meeting. In fact, all the members of the D.P.C. were fully aware of the facts of the case including the fact that the petitioner was not caught red-handed while accepting bribe, but was involved in an ACB trap case wherein the charge is that three persons, including the petitioner, in collusion with each other, had accepted the illegal gratification. This information is clearly indicative of the fact that the impression about the fact that the petitioner was caught red handed founded on no existing material and the fact that this belated explanation of the Under Secretary that DPC members were fully aware of the facts of the case including the fact that the petitioner was not caught red handed while accepting the bribe, is to say the least is to cover up the case. It cannot be accepted that the top officials of the State Government and the DPC did not understand while dictating the minutes of the meeting as to what would be the implication of the words 'caught red-handed' and what would it mean in ACB trap case. Nor did they care to read the minutes before signing the same as mark of approval, if they were aware about the fact that petitioner was not caught 'red handed' in any anti corruption case, and have authenticated the incorrect minutes of proceedings. If that is so, there cannot be any authenticity of minutes to

examine what has gone into consideration and what has not gone into consideration. More over, this impression in the mind of the Under Secretary carries no meaning vis-a-vis expression given by members of DPC under their signatures. Under Secretary is no person to explain the mental state of members of DPC who considered the case of petitioner and approved the minutes of proceedings. Moreover, the letter even does not support that 'caught red handed' was not the fact taken into consideration. If for the sake of argument, it is assumed that the members of DPC were aware about nonexistence of material and yet has chosen to express formation of their opinion on the basis of known nor existent material, the proceedings must be held to be vitiated by malafide. On the other hand, it appears more plausible from the expression used in the minutes that the DPC was acting on information supplied to them and used the same to lend support the then opinion and whosoever has fed this wrong information about pending consideration of Anti Corruption Case has deliberately planted to influence the mind of DPC. From the reply affidavit of Under Secretary, it is apparent that bureaucracy of State is not immune or insulated from political interference in the matter of operating service conditions. If the earlier decision of competent officer could be interfered with by then political forces, it cannot be assumed that on change of face of political forces that be in the power the very same machinery will not change its tune surrendering its objectivity in decision making.

9. What consideration has weighed with the DPC can be gathered from satisfaction recorded in the minutes and not by fathoming the minds of the officers manning the DPC on the basis of explanation furnished at a later stage by some officer of the State, when the question crops up what has gone into consideration and what has not gone into consideration. To countenance such a course would leave vast area open for embellishments by feeding the gaps and densify the myst clogging the transparency. It is well established that where there is documentation of any proceedings, no extraneous material can be considered for the purpose of finding what has weighed with the decision making authority, muchless any deposition by a third person about what was in the mind of the members of the DPC. It may be pertinent to notice that the DPC has merely recorded that they have been informed about the fact that the petitioner has been caught red handed. The explanation now furnished goes to show that either the DPC has been deliberately misled by giving the wrong information or something is being covered up under the guise of referring to nonexisting

material.

The fact that a case is pending consideration, by standard set by DPC itself was not a ground to find a person unsuitable, but required adoption of 'sealed cover' procedure. It can at best be the case for making recommendations subject to the outcome of the pending case, which is in general terms known as 'sealed cover process'. No finding has been reached by any one that the petitioner is guilty or is found guilty of illegal gratification. In that event, it is usually considered that during the pendency of proceedings against the person concerned, the recommendation in his regard should be without considering such inconclusive proceedings and be kept in sealed cover, to be given effect to only after the proceedings against him attains finality.

Suffice it to say that, on first occasion, the material which has gone into consideration for forming opinion about the suitability of the petitioner for the ex-cadre post is the alleged adverse entry referred to above only for a part of the period in the ACR for the year 1996-97 and the complaint of the alleged graft charge. On 27/3/1998, the petitioner was informed that as no ACB case is pending against him, the complaint before the vigilance commission is filed. That is to say, no case was pending on record as on 30/3/1998. The committee to reconsider the cases including that of the petitioner was constituted only on 4th April 1998, that is to say, on the date of first consideration, in view of decision of the Government existing on that date. ACB Trap Case could not be treated equivalent to pendency of the ACB case against the petitioner.

In this connection, a reference to the decision in the case of State of Gujarat and another v/s Suryakant Chunilal Shah reported in [1999] 1 SCC 529, in apposit. Though it is a case of compulsory retirement, it has relevant bearing on the question of legitimate inference that can be drawn against the incumbent on the basis of the pendency of a criminal case. It was a case in which, on receiving the complaint against the incumbent regarding issuing of permits for cement having been illegally issued by him, he was placed under suspension. An inquiry was ordered by the State CID against him and on the basis of the inquiry report, an FIR was lodged against the incumbent. Another FIR was lodged against him on the allegation that he has fabricated the rubber stamp of the Government to issue the bogus permits and he was put under suspension. On the basis of these complaints of issuing illegal permits and fabrication of

government rubber stamps, which in itself are of quite serious in nature and do in ordinary course clouds the integrity of the person concerned, the order of compulsory retirement was made. The Court said, "On finding that he was compulsorily retired, merely because of his involvement in two criminal cases pertaining to grant of permits in favour of fake and bogus institutions and there was no other material on the basis of which a reasonable opinion could be formed about continued utility of the incumbent. "The involvement of a person in a criminal case does not mean that he is guilty. He is still to be tried in a court of law and the truth has to be found out ultimately by the court where the prosecution is ultimately conducted.'

Whether mere involvement in a criminal case constitute a relevant material depends on facts of each case looking to the nature of offence allegedly committed by the employee.

There were no adverse remarks in the character roll entries of the respondent regarding his integrity, the Court also observed about inferences that could about integrity that,

'there being no material before the review committee, inasmuch as there were no adverse remarks in the character roll entries, the integrity was not doubted at any time, it could not come to the conclusion that the respondent was a man of doubtful integrity nor could have anyone else come to the conclusion that the respondent was a fit person to be retired compulsorily from service.'

In the present case also, the situation does not travel beyond it that, if the consideration of the petitioner being 'caught red handed' is taken out of consideration the fact that the petitioner is involved in a ACB trap case for which still the question of granting sanction for prosecution is pending consideration before the Government, though by order dated 7/6/1999, he has been suspended. that is to say, after the filing of this petition, and atleast previous government has thought it is not a fit case in which a sanction for prosecution is to be accorded, in the confidential reports of the petitioner, there is no adverse entry recording opinion of reporting officer about the integrity of the petitioner except noting the fact that a case has been registered and is pending as noticed above without

expression of any opinion of the officer writing the confidential reports, so far as the first material which was taken into consideration was nonexistent material and mere pendency of a complaint pending consideration for future course of action, could have been relevant only for the purpose of making a sealed cover process and not the outright rejection.

11. So far as the second material which has gone into consideration is the adverse entry related to period 1996-97. About this adverse entry, there is no dispute about the facts that it firstly relates to for a short period of the whole year, namely from 1/5/96 to 13/8/96, about which in the first instance, the petitioner was informed that they are not being treated as adverse entry to him for the purpose of future consideration and they have been communicated only as an advisory. The overall grading of the petitioner was 'good' for that year. Notwithstanding this communication the petitioner made a representation for expunging even those remarks were treated as advisory. That ultimately led to reconsidering the question whether the remarks are to be considered adverse or not and the petitioner was given a notice only on 24th May 1999, that is again after filing of this petition, inviting objection to the said adverse remarks. On their own, showing it had opined in its notings dated 10/12/98 that this material cannot be considered unless the petitioner was given an opportunity to make representation about it and the same has been considered and disposed of. The petitioner has challenged the notice dated 24/5/99 issued after filing of this petition and consequentially confirming those entries by order dated 24th August 1999 which petition has been decided on 9/9/1999. While upholding the calling of objection by letter dated 24/5/99, the order dated 24th August 1999 was quashed for the purpose of reconsidering the question in the light of representation made on 26/11/1998 which was altogether ignored and giving opportunity for further representation, if any, to be made within the period fixed in the order.

12. Be that as it may. The fact remains that the material which has been taken to be adverse and considered by the DPC while considering the case of the petitioner for suitability on the ex-cadre post in question, the same were the remarks communicated as advisory not to be acted upon as adverse and until the date of consideration even notice for treating the said remarks as adverse and giving an opportunity to the petitioner to file objections thereto have not been issued. It needs hardly to be stated that adverse

entries in the confidential reports which had been communicated as such, can not be taken into consideration.

13. In view of the aforesaid conclusions, I have no hesitation in coming to the conclusion that the consideration of the petitioner by the Departmental Promotion Committee either on 30/3/98 or 26/4/99 was not founded on any existing material or the material which could have been taken into consideration and the same is vitiated.

14. Considering what relief can be given, it may be noticed that now there is no dispute that the material concerning the confirmation of adverse entry is pending consideration and the petitioner has since been suspended pending consideration for sanctioning his prosecution for the alleged involvement in anti corruption case, it is only appropriate to direct the respondents to consider the case of the petitioner denovo as on the date juniors to him have been considered on the basis of material that was existing on that date and place their recommendations in a sealed cover to be given effect to on the outcome of pending proceedings referred to above. The inter se seniority of the petitioner in the next cadre would be subject to the final decision taken by the respondents in accordance with law on the basis of such recommendations made by the DPC.

In the facts and circumstances of the case, the parties shall bear their own costs.

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